

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WAYNE PICKERING,	)	Case No. CV 15-3058 R (FFM)
)	
Petitioner,	)	ORDER SUMMARILY DISMISSING
	)	PETITION FOR WRIT OF HABEAS
v.	)	CORPUS FOR LACK OF SUBJECT
	)	MATTER JURISDICTION;
STATE OF CALIFORNIA,)	
	)	REFERRING THE PETITION TO THE U.S.
Respondent.	)	COURT OF APPEALS PURSUANT TO
	)	NINTH CIRCUIT RULE 22-3(A);
)	
	)	DENYING A CERTIFICATE OF
	)	APPEALABILITY

DISMISSAL OF HABEAS PETITION WITHOUT PREJUDICE

On or about April 21, 2015, petitioner Wayne Pickering (“Petitioner”) constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”).¹ Petitioner challenges a sentence imposed by the Los Angeles County Superior Court in Case No. LA028284 in 1999.

¹ A *pro se* prisoner’s relevant filings may be construed as filed on the date they were submitted to prison authorities for mailing, under the prison “mailbox rule” of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379 (1988). In this case, Petitioner has not attached a proof of service to the Petition stating when the Petition was submitted for service. However, the postmark on the envelope containing the Petition is dated April 21, 2015. Thus, the court deems the Petition to have been filed “on or about” April 21, 2015.

1 The Court takes judicial notice of its files with respect to a prior habeas petition
2 (the "Prior Petition") Petitioner filed in this Court on or about November 26, 2001, Case
3 No. CV 01-10087 R (Mc). The Court notes that the Prior Petition was directed to the
4 same conviction and/or sentence sustained in Los Angeles County Superior Court Case
5 No. LA028284. On August 26, 2002, Judgment was entered in Case No. CV 01-10087 R
6 (Mc) denying the Prior Petition as time-barred and dismissing the action with prejudice.

7 The Petition now pending is governed by the provisions of the Antiterrorism and
8 Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) ("the Act") which
9 became effective April 24, 1996. Section 106 of the Act amended 28 U.S.C. § 2244(b) to
10 read, in pertinent part, as follows:

11 "(1) A claim presented in a second or successive habeas corpus application
12 under section 2254 that was presented in a prior application shall be
13 dismissed.

14 (2) A claim presented in a second or successive habeas corpus application
15 under section 2254 that was not presented in a prior application shall be
16 dismissed unless --

17 (A) the applicant shows that the claim relies on a new rule of
18 constitutional law, made retroactive to cases on collateral
19 review by the Supreme Court, that was previously unavailable;
20 or

21 (B)(i) the factual predicate for the claim could not have been
22 discovered previously through the exercise of due diligence;
23 and

24 (ii) the facts underlying the claim, if proven and viewed in
25 light of the evidence as a whole, would be sufficient to establish
26 by clear and convincing evidence that, but for

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1 constitutional error, no reasonable factfinder would have found
 2 the applicant guilty of the underlying offense.

3 (3)(A) Before a second or successive application permitted by this section is
 4 filed in the district court, the applicant shall move in the appropriate court of
 5 appeals for an order authorizing the district court to consider the
 6 application.”

7 Petitioner’s prior federal habeas petition was denied on the ground that it was
 8 barred by the one-year period of limitation. A dismissal based on the statute of
 9 limitations is considered an adjudication on the merits for purposes of determining
 10 whether a subsequent petition is successive under the Act. *Reyes v. Vaughn*, 276 F. Supp.
 11 2d 1027, 1029 (C.D. Cal. 2003); *see Plaut v. Spendthrift Farm*, 514 U.S. 211, 228, 115 S.
 12 Ct. 1447, 131 L. Ed. 2d 328 (1995) (“The rules of finality, both statutory and judge made,
 13 treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for
 14 failure to state a claim, for failure to prove substantive liability, or for failure to
 15 prosecute: as a judgment on the merits.”) (citing Fed. R. Civ. P. 41(b) and *United States*
 16 *v. Oppenheimer*, 242 U.S. 85, 87–88, 37 S. Ct. 68, 61 L. Ed. 161 (1916)); *Ellingson v.*
 17 *Burlington Northern Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981) (“A judgment based
 18 on the statute of limitations is ‘on the merits.’”) (citing *Mathis v. Laird*, 457 F.2d 926,
 19 927 (5th Cir. 1972)).

20 Therefore, because the Petition now pending challenges the same conviction as
 21 Petitioner’s prior habeas petition in Case No. CV 01-10087 R (Mc), it constitutes a
 22 second and/or successive petition within the meaning of 28 U.S.C. § 2244(b). To the
 23 extent Petitioner seeks to pursue the same claims he previously asserted, the Petition is
 24 barred by the provisions of 28 U.S.C. § 2244(b)(1). To the extent Petitioner seeks to
 25 pursue claims not previously asserted, as appears to be the case, it was incumbent on him
 26 under § 2244(b)(3)(A) to secure an order from the Ninth Circuit authorizing the District

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1 Court to consider the Petition, prior to his filing of it in this Court. Petitioner's failure to
 2 secure such an order from the Ninth Circuit deprives the Court of subject matter
 3 jurisdiction.

4 5 "REFERRAL" OF HABEAS CORPUS PETITION TO NINTH CIRCUIT

6 Ninth Circuit Rule 22-3(a) states, in pertinent part, that "[i]f a second or successive
 7 petition or motion, or an application for authorization to file such a petition or motion, is
 8 mistakenly submitted to the district court, the district court shall refer it to the court of
 9 appeals."

10 Therefore, to the extent the Petition was "mistakenly submitted" to this Court, the
 11 Petition must be referred to the court of appeals. However, it is unclear whether the
 12 district court may both "refer" the Petition to the Ninth Circuit and, at the same time,
 13 dismiss the Petition. After reviewing numerous district court cases in this circuit, this
 14 Court concludes that simultaneous referral and dismissal is appropriate. *See Cielto v.*
 15 *Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23, 2014).

16 17 DENIAL OF CERTIFICATE OF APPEALABILITY

18 Rule 11(a) of the Rules Governing § 2254 Actions provides:

19 (a) Certificate of Appealability. The district court must issue or
 20 deny a certificate of appealability when it enters a final order
 21 adverse to the applicant. Before entering the final order, the
 22 court may direct the parties to submit arguments on whether a
 23 certificate should issue. If the court issues a certificate, the
 24 court must state the specific issue or issues that satisfy the
 25 showing required by 28 U.S.C. § 2253(c)(2). If the court denies
 26 a certificate, the parties may not appeal the denial but may seek
 27 a certificate from the court of appeals under Federal

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1 Rule of Appellate Procedure 22. A motion to reconsider a
2 denial does not extend the time to appeal.

3 Here, given the Court's ruling on settled legal issues, the Court does not require
4 any arguments from the parties on whether a certificate of appealability ("COA") should
5 issue.

6 Under 28 U.S.C. § 2253(c)(2), a COA may issue "only if the applicant has made a
7 substantial showing of the denial of a constitutional right." Here, the Court dismissed the
8 petition on the ground that it was a second or successive petition. Thus, the Court's
9 determination of whether a COA should issue is governed by the Supreme Court's
10 decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000),
11 where the Supreme Court held that, "[w]hen the district court denies a habeas petition on
12 procedural grounds without reaching the prisoner's underlying constitutional claim, a
13 COA should issue when the prisoner shows, at least, that jurists of reason would find it
14 debatable whether the petition states a valid claim of the denial of a constitutional right
15 and that jurists of reason would find it debatable whether the district court was correct in
16 its procedural ruling." 529 U.S. at 484. As the Supreme Court further explained:

17 Section 2253 mandates that both showings be made before the court of
18 appeals may entertain the appeal. Each component of the § 2253(c) showing
19 is part of a threshold inquiry, and a court may find that it can dispose of the
20 application in a fair and prompt manner if it proceeds first to resolve the
21 issue whose answer is more apparent from the record and arguments.

22 529 U.S. at 485.

23 Here, the Court finds that its ruling is not one in which "jurists of reason would
24 find it debatable whether the district court was correct in its procedural ruling" that the
25 Court has no jurisdiction over the Petition.

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ORDER

Pursuant to Ninth Circuit Rule 22-3(a), the Court refers the habeas Petition to the U.S. Court of Appeals for the Ninth Circuit for consideration as an application for leave to file a second-or-successive habeas petition. The Clerk of Court shall send a copy of the habeas Petition and a copy of this Order to the Clerk of the U.S. Court of Appeals for the Ninth Circuit.

The Clerk of Court shall provide petitioner with a form recommended by the Ninth Circuit for filing an Application for Leave to File Second or Successive Petition Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

This action is then dismissed without prejudice for lack of subject-matter jurisdiction pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

LET JUDGMENT BE ENTERED ACCORDINGLY.

A Certificate of Appealability is DENIED. This is a final order, but it will not be appealable unless Petitioner obtains a certificate of appealability from the U.S. Court of Appeals.²

As required by Fed. R. Civ. P. 58(a)(1), final judgment will be issued separately.

DATED: May 4, 2015



MANUEL L. REAL
United States District Judge

Presented by:

/S/ FREDERICK F. MUMM
FREDERICK F. MUMM
United States Magistrate Judge

² See *Muth v. Fondren*, 676 F.3d 815, 822 (9th Cir. 2012) (citing 28 U.S.C. § 2253(c)(1)(B)), see also Fed. R. App. P. 22(b)(1).